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IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 77-1129

JERRY V. WILSON, Chief,
Metropolitan Police Department
and DISTRICT OF COLUMBIA,
Petitioners,

v.

HONORABLE RONALD V. DELLUMS, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1977

No.

Jerry V. Wilson, Chief,
Metropolitan Police Department
and District of Columbia,
Petitioners,

v.

Honorable Ronald V. Dellums, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, the District of Columbia and Jerry V. Wilson, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.[1]

[1] In the related case of *Powell, et al.* v. *Dellums, et al.*, No. 77-955, a petition for a writ of certiorari was filed on January 3, 1978, by the Solicitor General on behalf of James M. Powell, the Chief of the United States Capitol Police.

OPINIONS BELOW

The opinion of the court of appeals has not yet been reported and is set forth in Appendix A, *infra,* at pages 1a-30a. The opinion of the court of appeals in the related case of *Powell, et al.* v. *Dellums, et al.,* is set forth in Appendix A, at pages 1a-104a, to the certiorari petition filed in that case. The District Court rendered no opinion, but its judgment is set forth in Appendix C, pages 107a-112a, to the Powell petition.

JURISDICTION

The judgment of the court of appeals (Appendix B at page 31a) was entered on August 4, 1977. The orders of the court of appeals denying petitioners' petition for rehearing and suggestion for rehearing en banc (Appendix C at pages 32a-33a) were entered on November 14, 1977. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(a).

QUESTIONS PRESENTED

1. Whether the doctrine of *Bivens* v. *Six Unknown Fed. Narcotics Agents,* 403 U. S. 306 (1971), justifies a constitutional tort action against the District of Columbia Government (on a respondeat superior theory) and its Metropolitan Police Chief in favor of demonstrators arrested on the Capitol grounds pursuant to a congressional enactment delegating required peace keeping functions and related arrest making decisions to federal officials.

2. Whether the notice to the District given on behalf of 65 named claimants, pursuant to D. C. Code 1973, § 12-309, constitutes adequate notice on behalf of approximately 1200 individuals for whose benefit respondents' class action was brought.

STATUTES INVOLVED

D. C. Code, 1973, § 9-126:

§ 9-126. *Policing of Capitol Buildings and Grounds—Powers of Capitol Police—Arrests by Metropolitan Police.*

The Capitol Police shall police the United States Capitol Buildings and Grounds under the direction of the Capitol Police Board, consisting of the Sergeant at Arms of the United States Senate, the Sergeant at Arms of the House of Representatives, and the Architect of the Capitol, and shall have the power to enforce the provisions of sections 9-118, 9-119 to 9-126, 9-17 to 9-132 and regulations promulgated under section 9-131 and to make arrests within the United States Capitol Buildings and Grounds for any violations of any law of the United States or of any State, or any regulation promulgated pursuant thereto: *Provided,* That the Metropolitan Police force of the District of Columbia are hereby authorized to make arrests within the United States Capitol Buildings and Grounds for any violations of any such laws or regulations, but such authority shall not be construed as authorizing the Metropolitan Police force, except with the consent or upon the request of the Capitol Police Board, to enter such buildings to make arrests in response to complaints or to serve warrants or to patrol the United States Capitol Buildings and Grounds, with the exception of the streets and roadways shown on the map referred to in section 9-118 as being under the jurisdiction and control [of] the Commissioner of the District of Columbia. For the purpose of this

section, the word "grounds" shall include the House Office Building parking area. (July 31, 1946, 60 Stat. 719, ch. 707, § 9.)

P. L. 91-382, § 101, 84 Stat. 816, August 18, 1970 (D. C. Code, 1973, § 9-126a):

To enable the Capitol Police Board to provide additional protection for the Capitol Buildings and Grounds, including the Senate and House Office Buildings and the Capitol Power Plant, $880.000. Such sum shall be expanded only for payment of salaries and other expenses of personnel detailed from the Metropolitan Police of the District of Columbia, and the Commissioner of the District of Columbia is authorized and directed to make such details upon the request of the Board. Personnel so detailed shall, during the period of such detail, serve under the direction and instructions of the Board and are authorized to exercise the same authority as members of such Metropolitan Police and members of the Capitol Police and to perform such other duties as may be assigned by the Board. Reimbursement for salaries and other expenses of such detail personnel shall be made to the government of the District of Columbia, and any sums so reimbursed shall be credited to the appropriation or appropriations from which such salaries and expenses are payable and shall be available for all purposes thereof * * *.

D. C. Code, 1973, § 12-309:

§ 12-309. *Actions against the District of Columbia for unliquidated damages; time for notice.*

An action may not be maintained against the District of Columbia for unliquidated damages to

person or property unless, within six months after the injury or damage was sustained, the claimant, his agent, or attorney has given notice in writing to the Commissioner of the District of Columbia of the approximate time, place, cause, and circumstances of the injury or damage. A report in writing by the Metropolitan Police Department, in regular course of duty, is a sufficient notice under this section. (Dec. 23, 1963, 77 Stat. 511, Pub. L. 88-241, § 1, eff. Jan. 1, 1964; July 29, 1970, Pub. L. 91-358, title I, § 141(2), 84 Stat. 551.)

STATEMENT

In a civil action filed in the United States District Court for the District of Columbia on November 11, 1971, approximately 1200 members of a class represented by ten named plaintiffs-respondents sought damages against the District of Columbia, Jerry V. Wilson, then Chief of the Metropolitan Police of the District of Columbia, and James M. Powell, the Chief of the United States Capitol Police, for false arrest, malicious prosecution and violation of First and Eighth Amendment rights. The action stemmed from arrests occurring in the course of a "Mayweek" related demonstration at the Capitol on May 5, 1971. (J. App. 26-38.)

In answering respondents' complaint allegations, Chief Powell and the District of Columbia petitioners denied the unconstitutional conduct attributed to them (J. App. 39-53), and additionally asserted that the arrests made on the Capitol steps were lawfully undertaken in the course of official governmental duties of Chief Powell (J. App. 39, 49). The District also claimed that it was protected by the doctrine of governmental immunity and that respondents failed to give advance notice of their claims for damages as required by D. C. Code, 1973, § 12-309 (J. App. 48-49). Respondents purported to comply with § 12-309 by

a letter written to the then Commissioner of the District of Columbia on November 4, 1971, by Monroe H. Freedman, Special Counsel, American Civil Liberties Union Fund (J. App. 75-81). The letter recited in general terms that about 1200 claimants were unlawfully arrested on the Capitol steps on the occasion in question and were subjected to excessive force and other abusive conduct. It went on to specifically name 65 claimants who allegedly sustained injuries of various kinds and degrees and represented that such injuries were "typical of those sustained by the group of claimants as a whole" (J. App. 75-81). Over the objection of petitioners (J. App. 54-83, 89-92), the case proceeded to trial as a class action, the court defining the class as "all persons who were arrested while assembled on the Capitol steps on May 5, 1971." (J. App. 85-87.)

Under congressional enactment (D. C. Code, 1973, § 9-126), the preservation of peace and the maintenance of order at the Capitol buildings and grounds is the responsibility of a Capitol Police Board consisting of the Sergeants-at-Arms of the respective Houses of Congress and the Architect of the Capitol. The Board is the immediate supervisor of the Capitol Police Chief. Each Sergeant-at-Arms is responsible for the preservation of peace in, and the orderly functioning of, his respective wing of the Capitol and the Capitol Police Chief is charged with the duty of implementing the discharge of these responsibilities (J. App. 1108-110, 1326, 1524). The Metropolitan Police Department has no authority to perform general peace keeping functions at the Capitol or to assume custody of persons on the Capitol grounds, except when specifically called upon to do so by the Capitol Police Board or the Capitol Police Chief as its representative. When such authority is given, any arrests are considered to be those of the Capitol Police, with Metropolitan Police officers "merely assisting." Although the Metropolitan Police Department

sometimes provides personnel to assist the Capitol Police Chief in the preservation of peace at the Capitol, the Capitol Police Chief is "in charge of all police activities within the Capitol grounds" and was in charge on May 5, 1971 (J. App. 1108, 1151-1152, 1430, 1601, 1631-1632, 1703).

Well in advance of the expected demonstration, Chief Powell and other government officials had read in a tactical manual published and distributed by the "Mayday Coalition" (J. App. 1140) that:

> • • • On May 5th Algonquin Peace City will shift its camping grounds from Rock Creek Park to the U. S. Capitol Building. There, it is expected that we will lay a nonviolent seige of the Congress, forcing it to remain in session until it ratifies the People's Peace Treaty or until we are all arrested.

On the morning of May 5, 1971, in anticipation of the demonstration, Chief Powell met with the Sergeants-at-Arms of the respective Houses, the Administrative Assistant to the Speaker of the House of Representatives, Chief Wilson, and Eric Marcy, an Assistant United States Attorney assigned to provide advice as to the legal aspects of dealing with the then expected demonstration. All in attendance at that meeting understood that Chief Wilson and the Metropolitan Police would have no authority to take any demonstrators into custody without advance authorization from Chief Powell. But because of the unavailability of sufficient Capitol police to deal with the expected demonstration, Metropolitan Police officers were dispatched to the Capitol at the request of the Capitol Police Board. (J. App. 1146-1150, 1403, 1631-1632.)

That same morning, representatives of the "People's Coalition" made arrangements to meet at 2:45 p.m., with several members of Congress on the House steps of the east wing of the Capitol building to present a peoples'

peace treaty and to register a protest against the war in Southeast Asia (J. App. 293, 317, 649-650, 780, 2071).

Around 1:00 p.m., Chief Powell and Mr. Marcy proceeded to the west front of the Capitol grounds and subsequently met with Chief Wilson who stated that there were sufficient Metropolitan Police officers available to provide support in any emergency that might arise. Gilbert Zimmerman, another Assistant United States Attorney, also arrived on the scene (J. App. 1146-1147, 1150-1152, 1975). As the District Court observed (J. App. 2067), "it is conceded by everybody that * * * [Mr. Zimmerman] is the U. S. Attorney's expert in * * * [the] field" of First Amendment rights. He was sent to advise Chief Powell as to the applicability to the expected demonstration of the Capitol grounds statute, D. C. Code, 1973, § 9-124, as construed in June 1969, by Chief Judge Greene of the then District of Columbia Court of General Sessions in *United States* v. *Nicholson* (J. App. 2480-2497), aff'd., 263 A. 2d 56 (D. C. App., 1970) (J. App. 1124-1127, 1152-1153). A third Assistant United States Attorney was sent to the general scene of the demonstration for observatory and information gathering purposes in anticipation of criminal prosecutions by the United States (J. App. 532, 537-538, 544-545, 559).

As the demonstration group was assembling in the mall area around 2:00 p.m., Chief Powell received intelligence information that the group had estabilshed alternative plans calling for acts of civil disobedience and violations of law at the Capitol (J. App. 546-550). At about 2:30 p.m., the group, consisting of about 1200 demonstrators carrying placards, banners, and bullhorns, proceeded from the mail area enroute to the Capitol in an easterly direction on Independence Avenue, completely blocking its eastbound lanes (J. App. 1171, 1369-1371, 1381, 1385, 1482, 1935A, 1989). At about 2:45 p.m., the group was stopped at the intersection of Independence Avenue

and New Jersey Avenue by Inspector Xander of the Capitol Police. Congressmen Dellums and Mitchell, and Congresswoman Abzug, who had by then joined the group, informed the Inspector that the group had been invited to meet with them on the House steps of the Capitol. The group was permitted to proceed to the House steps where most of its members were later arrested in the course of speeches given by members of Congress (J. App. 297, 321-322, 388, 568, 570, 573, 653-654, 1172, 1486-1487, 1500, 1560). The basis of these arrests was the behavior of the group during the approximately 20 minute interval which preceded those speeches.

Between 2:45 and 3:00 p.m., the group ascended the House steps and when Chief Powell, who had a bullhorn, and the two Assistant United States Attorneys assigned to advise him, arrived at the foot of the steps at 2:56 p.m., the steps were almost filled (J. App. 1174-1175, 1223, 1372). The House was then in session, its Ways and Means Committee, located behind the windows at the top of the steps, was conducting a meeting (J. App. 1345-1346, 1543-1544), and the Speaker's staff members, whose office windows also front the steps, were attempting to perform their assigned work (J. App. 1520-1521). In the course of the 20 minute period which followed their arrival, various of the demonstrators pounded on windows, wrote on walls, climbed on poles and balustrades, and constantly engaged in loud chanting, singing, and shouting (J. App. 1174-1175, 1298, 1300, 1334, 1345-1348, 1354, 1374, 1404, 1410-1413, 1462-1463, 1485, 1492, 1521, 1525,, 1543-1544, 1569 1810-1812, 1935B, 1950-1953, 1988, 2501).

Numerous individuals, testifying on respondents' behalf, noted that the assembled group was singing, chanting, and making noise prior to the commencement of the speeches (J. App. 294-295, 296, 351, 366, 410-411, 449, 494, 513-514, 527, 539, 568, 632, 639, 643, 646-648, 653, 657-658, 686 698). A television reporter (J. App. 510-511) heard the crowd

repeatedly chant in "loud tones." Although the reporter was standing "quite close" to Chief Powell when the Chief made his first bullhorn annoucement, he was unable to hear it because of the competing noise of the crowd (J. App. 513-514, 527). Various other individuals assembled at dfferent locations in the crowd observed the bullhorn, but were unable to hear the announcements that it transmitted (J. App. 496, 556, 643, 660, 668, 675-676, 698-699, 736-737, 742-745, 786-787, 793; cf. J. App. 1301). Nancy Hornick, one of the demonstrators (J. App. 673-674), observed that the group chanted various things before the speeches began, including "one, two, three, four, we don't want your fucking war" (J. App. 686). As she put it, "* * * It is fair to say it [the noise] was loud" (J. App. 698). A newspaper reporter called by respondents (J. App. 640-641), testified that there was an "awful lot of noise" (J. App. 643), that he heard the noise from both inside and outside the building and that, while inside the building, he was informed "that the Speaker [of the House] was very upset because he felt the noise was interferring with work" (J. App. 646-648).

The Legislative Assistant to the Speaker of the House (J. App. 1517) testified that the work of his office was disrupted by what transpired on the nearby steps after the arrival of the demonstrators (J. App. 1522, 1537, 1539-1540). Explaining the impact of the outside activity upon such work, he stated (J. App. 1521) that:

> * * * [T]his group came up to the stairs, and there was a lot of activity immediately outside our windows. The windows sit back at the back of this porch, and we can only see the porch area and not down the stairs, but there were a lot of people—activity back and forth of the crowd milling around. One or two hundred people actually up within our line of sight in the windows were yelling and chanting. Some of them were pounding on our windows, trying to distract and disturb us.

He went on to state (J. App. 1525) that:

> We were trying to conduct our work. There was a great deal of disturbance on the outside. As I indicated earlier, people were banging on our windows, shouting at us through the windows, trying to engage us in debate or conversation. * * *

In a similar context, the Chief Counsel of the House Ways and Means Committee (J. App. 1543), which, at the time of the outside activity, was working "on some complex, important matters" (J. App. 1547) testified (J. App. 1544-1546) that:

> They were walking around up on those ledges at the top of the steps, and on occasion were rapping very loudly on our Committe windows, and making a great deal of noise * * *.
>
> * * *
>
> * * * [T]hee noise was quite disruptive of the Committee and quite disturbing. As I say, we pulled the blinds on the windows in order to try to insulate ourselves somewhat. The noise and the chanting, I would say, from the outside was quite loud and totally disruptive, almost, of the Committee meeting.

Complaints regarding the disruptive behavior of the group were made to a Capitol Police Lieutenant by staff members of both the Committee and the Speaker (J. App. 1950-1962).

After Chief Powell had observed the behavior of the assembled group for about five minutes, he requested the

advice of Assistant United States Attorney Zimmerman as to whether the group was in violation of the Capitol Grounds statute as contrued in *Nicholson* and was promptly advised that a very flagrant violation was taking place. The Chief then attempted to issue his first series of bullhorn announcements from the bottom of the steps and to inform the group tha it was in violation of law and must disperse (J. App. 1174-1177, 1342-1343, 1391, 1984). As he tried to convey such a message, the crowd increased the volume of its noise (J. App. 1176, 1291, 1377, 1985). Describing the reaction of the crowd, Chief Powell stated on cross-examination (J. App. 1921) that:

> I only got so far as stating that I was Chief of Police when this terrific roar went up and several pointed to me and called me a S of a B, and other things that I don't like to repeat here in front of the jury. But they were four-letter words.
>
> It was my impression from that reaction that this group did not intend for me to remind them that they were noisy. I thought they certainly already knew it. And I did then continue on and attempt to get them to listen as I announced three or four times over the bullhorn that I was Chief of the Capitol Police, and they were a noisy, loud, disruptive group. And I asked them to remove themselves from the steps immediately, at which time they reacted with loud chants and clinched fists as an indication to me that they didn't intend to pay much attention to what I had to say.

Chief Powell repeated the message after further discussion with Assistant United States Attorney Zimmerman, who described the crowd's resulting response as follows (J. App. 1985):

> As he did that [i.e., repeated the announcement], there was a din that seemed to increase as though

> the group wanted to drown out the Chief and his announcement. In other words, the sound—the loudness of the group increased in volume.

After Chief Powell made the initial series of bullhorn announcements, he was approached by Inspector Xander who informed him that the Speaker of the House had stated that the group should be permitted to meet with members of Congress on the Capitol steps if its behavior remained orderly (J. App. 1220-1224, 1519-1520). Convinced that such a criterion had not been met, the Chief and federal counsel, at about 3:05 p.m., went underneath the steps at the foot of the Capitol to confer with the House Sergeant-at-Arms (J. App. 1177-1180, 1224, 1414-1415, 1987-1988). The Chief advised the Sergeant-at-Arms that he was confronted with a noisy and unruly crowd that should be dispersed and the Sergeant-at-Arms in turn conversed with the Speaker of the House. The Speaker approved the Chief's recommendation that the group be removed from the House steps and upon returning from his meeting with the Speaker, the Sergeant-at-Arms told Chief Powell to do whatever was necessary to effect such removal, including the making of any required arrests (J. App. 1179-1180, 1414-1417, 1514-1516, 1522-1523, 1987-1988).

At about 3:14 p.m., the Chief, accompanied by federal counsel, went outside and at 3:15 p.m., after proceeding up the steps about 10 feet into the crowd, issued a second series of bullhorn announcements and dispersal orders (J. App. 1237, 1343, 1374-1377, 1469, 1484-1485, 1988-1989). At that point, the group was more stationary and organized, most of its members having seated themselves, but the noise level had not significantly changed (J. App. 1241-1242, 1374, 1485, 1502; cf. J. App. 1225-1227). Describing the behavior of the crowd at that time, Captain Abernathy of the Capitol Police stated (J. App. 1374) that:

> * * * [T]hey were extremely loud, and some-chanting in unison, and on other occasions that would die off, and they would be shouting their individual slogans and profanities.
>
> There were some still pounding on the windows. You could see them separated enough to observe that. I observed one man that did disrobe. That brought a loud response.

As the second series of announcements were made, the crowd again made competing noise and one of its members turned up a portable amplification system that had been brought to the House steps (J. App. 1183, 1377, 1469, 1989). In the iterval that followed the second series of announcements, numerous demonstrators left the area (J. App. 1376-1377, 1487, 1883, 1989-1990). Thereafter all remaining demonstrators were placed under arrest by Chief Powell (J. App. 1185, 1884-1885). Arrest teams of the Special Operations Division of the Metropolitan Police Department then removed these individuals from the steps and took them into physical custody (J. App. 1813, 1818-1821). A field arrest form, with a contemporaneous photograph, was prepared on each individual taken into custody (J. App. 382, 1636-1637, 1991).

Asked on cross-examination to state the justification for his dispersal orders and his related state of mind (J. App. 1298-1301, 1340), Chief Powell explained that, from his vantage point at the bottom of the steps, he had been informed of the disruptive activity around the windows at the top of the steps (J. App. 1298, 1340, 1334-1335), that he saw persons climb on balustrades and lamp posts, and others that appeared to be writing on walls (J. App. 1298-1300). In addition, he was quite concerned about the disruptive impact of the noise volume on those inside the Capitol building and in that regard stated on cross-examination (J. App. 1301) that:

> * * * They were making so much noise, as has been said, they couldn't—if they say they couldn't hear my bull horn, and I attempted to get through to them, and I had thought that they had heard, but they were making so much noise that they were sufficiently loud so that there could be some question as to whether each and every person did in fact hear it. The very fact they were making that much noise and the fact that I knew the House was in session, and I knew that there was a Committee Room inside which had a hearing going on, I was concerned that they certainly were disturbing the orderliness of the Congress.

After the arrests were completed, a second group of about 100 demonstrators, which had been unable to join the initial assemblage, ran to the steps, shouted obscenities and demanded to be arrested. This group was ordered to disperse and upon its failure to do so also was taken into custody. In light of what had previously taken place, Chief Powell, who had been instructed by the Chairman of the Capitol Police Board to clear the grounds, did so by arresting this second group (J. App. 1191-1192, 1311-1312, 1886-1887, 1931-1932).

Following their arrests, the demonstrators were taken to the District of Columbia Coliseum where attempts were made to process them. Those who submitted to processing were subsequently taken to the District of Columbia Superior Court and those who did not were transported to the cellblock of the United States Courthouse (App. A at 16-18). The demonstrators were charged by the United States with violating the Capitol Grounds statute and with unlawful entry, following discussions involving Chief Powell and various Assistant United States Attorneys, and ultimate personal approval by the United States Attorney for the District of Columbia. Eight specific cases

were selected for prosecution in the Superior Court, and following the acquittal of the demonstrators involved in those cases, the United States Attorney elected not to proceed in the remaining cases (J. App. 2003-2005, 2100-2103, 2111-2117, 2129-2130, 2135, 2140-2141).

The jury awarded damages against the District of Columbia, Chief Wilson and Chief Powell for malicious prosecution and violation of First and Fourth Amendment rights. It returned a verdict against the District only based on Eighth Amendment liability (J. App. 129-132). It awarded total damages exceeding $12,000,000. Following the entry of judgment on the verdicts and the denial of post-judgment motions, the District, Chief Wilson and Chief Powell appealed (J. App. 129-136).

The court of appeals affirmed the judgment to the extent that it related to the liability of the District of Columbia and Chief Wilson under the First and Fourth Amendments. The court also held that all respondents had satisfied the statutory notice requirement contained in D. C. Code, 1973, § 12-309. However, the court concluded that the amount of damages awarded for violation of First Amendment rights was so excessive as to require a new trial and additionally vacated the Eighth Amendment based award of damages against the District in its entirety. On November 14, 1977, the court of appeals denied a petition for rehearing and suggestion for rehearing en banc filed by the District and Chief Wilson, and this petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

The holding of the court of appeals that the District, as a governmental entity, may be compelled to respond in damages for constitutional torts on a respondeat superior theory raises a question of substantial importance under the Court's decision in *Bivens* v. *Six Unknown Fed. Narcotics Agents,* 403 U. S. 388 (1971). This Court plainly

recognized in *Bivens* that the appropriateness of constitutionally based damages remedies logically requires a consideration of any "special factors counselling nesitation in the absence of affirmative action by Congress." 403 U. S. at 396. In particular, this Court noted (403 U. S. at 397) that:

> * * * Finally, we cannot accept respondents' formulation of the question as whether the availability of money damages is necessary to enforce the Fourth Amendment. *For we have here no explicit congressional declaration* that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress. * * * (Emphasis added.)

Various federal courts, in refusing to extend the *Bivens* doctrine to municipalities, have concluded that the creation of a constitutional tort action against these governmental entities would circumvent their explicit congressional exclusion from liability under 42 U. S. C. § 1983. See *Kostka v. Hogg,* 560 F. 2d 37 (1st Cir., 1977); *Sandoval* v. *Brown,* 432 F. Supp. 1028, 1029-1030 and n. 3 (D. N. M., 1977); *Farnsworth* v. *Orem City,* 421 F. Supp. 830, 831 (D. Utah, 1976); *Rafferty* v. *Prince George's County,* 423 F. Supp. 1045, 1057-1058 (D. Md., 1976); *Livingood* v. *Townsend,* 422 F. Supp. 24 (D. Minn., 1976); *Pitrone* v. *Mercadante,* 420 F. Supp. 1384 (E. D. Pa., 1976); *Perry* v. *Linke,* 394 F. Supp. 323 (N. D. Ohio E. D. 1974). However, the matter has given rise to a rapidly expanding decisional split in the lower federal courts. See, e.g., *Gentile* v. *Wallen,* 562 F. 2d 193, 195-197 (2nd Cir., 1977); *Jones* v. *McElroy,* 429 F. Supp. 848, 856 (E. D. Pa., 1977).

In *Mt. Healthy City Board of Ed.* v. *Doyle,* 429 U. S. 274, 278 (1977), this Court recently recognized the extreme im-

portance of the question whether, by analogy to *Bivens*, it should imply a remedy from the Constitution against a governmental entity not otherwise subject to liability under 42 U. S. C. § 1983. But, because the question was not properly presented in that case, the Court declined to resolve it (429 U. S. at 278). See also *City of Charlotte* v. *Firefighters*, 426 U. S. 283, 284, n. 1 (1976); *Aldinger* v. *Howard*, 427 U. S. 1, 4 n. 3 (1976). It is, however, squarely presented here. The District's exclusion from liability under § 1983 is, of course, based on a different rationale than that generally governing the non-liability of other municipalities under that enactment. Compare *District of Columbia* v. *Carter*, 409 U. S. 418 (1973) with *Monroe* v. *Pape*, 365 U. S. 167 (1961). But its status as a congressionally created municipal corporation can hardly single it out in a manner which distinguishes it from all other municipalities in terms of its amenability to respondeat superior based constitutional tort liability in "a *Bivens*-type cause of action [which] is the federal counterpart to claims under 42 U. S. C. § 1983 * * *." See *Paton* v. *La Prade*, 524 F. 2d 862, 871 (3rd Cir., 1975); *Bivens* v. *Six Unknown Named Agents of Fed. Bur. of Narc.*, 456 F. 2d 1339, 1346 (2nd Cir., 1972).

In addition, there are other explicit congressional declarations which cast serious doubt on the extension of *Bivens* to municipal liability like that endorsed by the court of appeals.

First, the Capitol Grounds statute plainly negates that kind of liability. D. C. Code, 1973 § 9126, and its legislative history, make it abundantly clear that when, as here, Metropolitan Police officers "patrol" and perform general peace keeping functions at the Capitol at the request of the Capitol Police Board, they function in a federal capacity as agents of the United States. As such, unlike the Capitol Police Chief and his federal subordinates, they have no independent decision-making power concerning the arrest

function. In the language of the Senate Report on § 9-126, any other construction of that enactment would have the unmistakable effect of "nullifying the prime jurisdiction of the Capitol Police over the Capitol Buildings and Grounds." See S. Rept. No. 1709, 79th Cong., 2nd Sess., July 12, 1946, at 5.

Consistent with that legislative policy, the record incontrovertibly establishes that (1) Metropolitan Police Officers were dispatched to the Capitol grounds on May 5, 1971, "at the request of the Capitol Police Board," (2) such a request was necessary because of the unavailability of sufficient Capitol Police officers to perform necessary peace keeping functions in connection with the expected mass demonstration (J. App. 1146-1148), (3) Chief Powell, not Chief Wilson, was in charge of "all police activities," including the making of necessary demonstration-related arrests, and (4) Chief Wilson and his police subordinates were totally powerless to assume custody of any demonstrator without Chief Powell's specific advance authorization, which followed the advice of federal counsel (J. App. 1152, 1185, 1616-1617, 1631, 1703, 1714, 1985). In *Denton* v. *Yazoo & M. V. R. Co.*, 284 U. S. 305, 308-309 (1932), this Court held that when, as here, individuals perform work for the benefit of the United States under an enactment which places key elements of control in a federal officer, they become borowed federal servants. This Court also made plain that there is simply no basis for imposing liability on the lending employer under such circumstances. See also *Provancial* v. *United States*, 454 F. 2d 72 (8th Cir., 1972). The decision of the court of appeals appears to be in direct conflict with that rationale.

Second, under P. L. 91-382, § 101, 84 Stat. 816 (August 18, 1970) (see also D. C. Code, 1973 § 9-126a), Metropolitan Police officers assigned to a "detail" at the Capitol are totally subject to federal authority and simply do not act for the District's benefit (J. App. 1639-1640). It is

equally clear that, when Metropolitan Police officers were dispatched to the Capitol on May 5, 1971, at the special request of the Capitol Police Board (J. App. 1146), such a "detail" existed, notwithstanding its brief duration. While such a temporary assignment may not have called for the reimbursement which occurs in cases involving assignments of longer duration, that circumstances does not defeat the conclusion that under any reasonable construction of P. L. 91-382, § 101, what occurred on May 5, 1971, was the equivalent of a "detail."

Third, under 28 U. S. C. § 2680(h), as it existed at the time of the mass demonstration involved, the United States was incontrovertibly exempt from the kind of liability imposed here.[2] Yet, in spite of the undisputed need to call upon the District Government in order to insure the Federal Government's capability of maintaining the security of its own grounds, the court of appeals (App. A at 10-13) perfunctorily allows the liability of one government entity to be substituted for that of another. But, since the District, in acting for the benefit of the United States under Federal direction and on federal grounds, was engaged in the precise type of activities at which § 2680(h) government liability exemptions are aimed, this case surely presents a substantial question as to whether that enactment serves

[2] As an integral component of the Federal Tort Claims Act, 28 U. S. C. § 2680(h), then conferred federal immunity in connection with "[a]*ny claim arising out of* assault, battery, *false imprisonment, false arrest,** * * abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights" (emphasis added). The ruling of the court of appeals (App. A at 15-16) that recent amendments to § 2680(h), altering the federal government's liability, provides a special factor justifying a *Bivens*-type action against the District plainly discounts the circumstance that those amendments were enacted *after the occurrence of the mass demonstration involved.* Cf. *Washington* v. *Davis,* 426 U. S. 229, 238 n. 10 (1976).

as an explicit congressional declaration foreclosing a *Bivens* type action against it.[3]

The holding of the court of appeals that a constitutionally based award of damages was justified against Chief Wilson likewise raises a question of extreme importance under *Bivens.* It must be remembered that the allegations in that case were that federal agents entered Bivens' apartment in the early morning without either probable cause for a search or an arrest warrant. Turned out of bed, he was arrested, manacled, and searched "from stem to stern." He was then taken to the station house, strip searched, and released without charges ever being filed. Given such a direct and outrageous intrusion by police officers, the considerations which influence judicial discretion in the creation of a constitutionally implied damages remedy are quite compelling. Here, in contrast, Chief Wilson has engaged in no direct invasion of a constitutionally protected interest. The conclusion that he must still respond in damages on a constitutional tort theory is necessarily based on the premise that he was constantly required to remain at Chief Powell's side and monitor his every action between the arrival and the mass arrests of the demonstrators. However, his failure to do so amounts to nothing more than a deferral to the judgment of the federal official, admittedly "in charge of all police activities within the Capitol Grounds" on May 5, 1971 (J. App. 1152). Chief Wilson's inaction in such a context hardly equates with the direct and conscious wrongdoing on which constitutional tort actions must be predicated. Ct. *Paul* v. *Davis,* 424 U. S. 693, 701 (1976); *Rizzo* v. *Goode,* 423 U. S. 362 (1976); *Wood* v. *Strickland,* 420 U. S. 308, 319 (1975). Moreover, not a single demon-

[3] Aside from any considerations pertaining to the unwarranted extension of the *Bivens* doctrine by the court of appeals, it is submitted that the court's construction of the Capitol Grounds statute, i.e., D. C. Code, 1973, § 9-126, *supra, vis a vis* the matter of municipal liability at the federal enclave involved, in and of itself raises a question of sufficient importance to justify this Court's review.

strator could be removed from the Capitol grounds without the advance authorization of Chief Powell, that is, *after* he (Chief Powell) made the arrests (J. App. 1152, 1185, 1631, 1703). The thesis that *Bivens* nonetheless justifies Chief Wilson's liability simply because the actual removal was effected by local officers as the final link in a federally-structured chain of command stretches the *Bivens* rationale beyond its breaking point and is sufficiently substantial to warrant this Court's scrutiny.[4]

Likewise substantial is the question presented by the holding of the court of apeals that notice of a claim tendered in behalf of a small number of persons is sufficient to satisfy the statutory notice requirement as to all unnamed members of an immense class which later files suit. In *Zahn* v. *International Paper Co.*, 414 U. S. 291 (1973), this Court held that each member of a class, not merely the named plaintiffs, must satisfy the amount in controversy requirement of 28 U. S. C. § 1332 as a prerequisite to invocation of jurisdiction. Since the notice requirement of § 12-309 is a mandatory threshold requirement and a necessary condition precedent to the institution of suit—*Hill* v. *District of Columbia*, 345 A. 2d 867, 869 (D. C. App., 1975)—it would appear that the court of appeals' construction of that enactment is conceptually inconsistent with *Zahn*. Moreover, the importance of this aspect of the case from a certiorari standpoint is underscored by recent decisions of three other circuits which reached a different result in construing a similar notice requirement contained in the Federal Tort Claims Act. See 28 U. S. C. § 2675(a).

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[4] Chief Powell asserts in his certiorari petition that substantial questions exist as to whether his liability is foreclosed by the doctrine of official immunity and whether this Court's holding in *Bivens* extends to First Amendment based actions for damages. We agree with this submission, adopt the position of Chief Powell in these respects, and hasten to add that if the liability of Chief Powell, who performed the key decisional role, is foreclosed under this Court's teachings, it would indeed be anomalous to impose liability on either the District or Chief Wilson.

In *Commonwealth of Pa.* v. *National Ass'n of Flood Ins.*, 520 F. 2d 11 (3rd Cir., 1975), the Court held that written notice tendered by a State on behalf of numerous unnamed property owners who sustained flood damage was insufficient to satisfy the FTCA notice requirement. The Court relied heavily on the plain terms of § 2675 in holding that such terms required separate and individual notice on the part of each claimant (520 F. 2d at 23-24). And in construing an implementing regulation which, like § 12-309, permitted a claim to be presented by an authorized agent of the claimant, the Court held that, without proof of agency, the notice was invalid (id. at 23).

Similarly, in *Blain* v. *United States*, 552 F. 2d 289 (9th Cir., 1977), the Court considered the sufficiency of a class type notice as to unnamed individuals whose property was damaged by a forest fire. In concluding that, under FTCA standards, the notice was fatally defective as to the unspecified plaintiffs, the Court emphasized that there was no evidence of any kind to establish an agency relationship between those filing the notice and these plaintiffs.

More recently, in *Lunsford* v. *United States*, —— F. 2d —— (8th Cir., No. 76-1984, December 31, 1977), a small number of persons brought an action on behalf of all individuals who lost their lives and property as a result of a flood causing substantial property damage as well as 283 deaths. The Court held that absent individual notice by identifiable injured parties or specific proof that the named parties acted as their agents, the aplicable FTCA notice requirement could not be met. See also *Harrigan* v. *United States*, 63 F. R. D. 402 (E. D. Pa., (1974).

The unprecedented class-based notice holding of the court of appeals is difficult to reconcile with these recent decisions and plainly rises to a level of importance sufficient to warrant this Court's review.

CONCLUSION

Upon the foregoing, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1975

HONORABLE RONALD V. DELLUMS *et al.*

v.

JAMES M. POWELL, Chief,
United States Capitol Police, *et al.*

JERRY V. WILSON, Chief, Metropolitan Police Department,
and DISTRICT OF COLUMBIA, APPELLANTS

[DISTRICT OF COLUMBIA APPEAL]

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil Action No. 2271-71)

Argued January 14, 1977

Decided August 4, 1977

Judgment entered
this date

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

David P. Sutton, Assistant Corporation Counsel for the District of Columbia, with whom *John R. Risher, Jr.*, Corporation Counsel, *Louis P. Robbins*, Principal Assistant Corporation Counsel, and *Richard W. Barton*, Assistant Corporation Counsel, were on the brief, for appellants. *C. Francis Murphy*, Corporation Counsel at the time the record was filed, also entered an appearance for appellants.

Warren K. Kaplan, with whom *Lawrence H. Mirel*, *Ralph J. Temple*, *Mary McReynolds*, and *Kenneth V. Handal* were on the brief, for appellees.

Before WRIGHT, TAMM, and LEVENTHAL, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* WRIGHT.

Dissenting statement filed by *Circuit Judge* TAMM.

WRIGHT, *Circuit Judge*: In this companion case to *Dellums v. Powell*, D.C. Cir. No. 75-1974 (August 4, 1977) (*Dellums I*), we consider appeals taken by Metropolitan Police Chief Jerry V. Wilson and the District of Columbia from a final judgment entered on jury verdicts in the trial below. The facts of this case and its procedural history are set out in *Dellums I*.

On this appeal the District of Columbia defendants have adopted points raised in Chief Powell's brief "to the extent consistent with their non-liability in this case." Appellants' brief at 22. We shall follow suit and adopt *Dellums I* in answer to those points except as expressly stated herein. While the bulk of the remaining issues in this case pertain to the District of Columbia, we turn first to Chief Wilson's liability.

I. LIABILITY OF METROPOLITAN POLICE CHIEF JERRY V. WILSON

Chief Wilson was held liable by the jury for false arrest, malicious prosecution, and violation of both Dellums' and the class plaintiffs' First Amendment rights. At trial

Chief Wilson did not seek to establish official immunity as a defense, but instead asserted that he was insufficiently involved with the May 5 arrests to support tort liability. He takes the same position here. We disagree with respect to the false arrest and First Amendment claims, but we find no link between Chief Wilson and the prosecution of the class plaintiffs and therefore reverse in part.

The record is conflicting with respect to Chief Wilson's role in the events of May 5. Nonetheless, evidence would support a finding that Chief Wilson collaborated on the charge upon which arrests were to be made, and further that he advised Chief Powell against taking additional steps to ensure the effectiveness of dispersal orders at a time when there was some doubt that the orders had been heard.[1] It is also undisputed that Chief Wilson retained personal operational control over all Metropolitan Police officers on the scene and could have withdrawn them had he thought the arrests unjustified.[2] This was sufficient

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[1] *See* Tr. 1927-1929, 2461, 820, 2071-2077, 3859-3860; JA 1151-1153, 1478, 645, 1261-1267, 2000-2001.

[2] Chief Wilson testified as follows, Tr. 2681-2682, JA 1640-1641:

> Q Is one of the purposes for Chief Powell maintaining the rank that he does in the Metropolitan Police Department so that he will have authority over other lower ranking Metropolitan Police officers who are assigned on detail to the Capitol Police?
>
> A No, sir.
>
> Q It is not?
>
> A No.
>
> Q And if he testified to the contrary, that would be incorrect?
>
> A I would say that would be incorrect: I would say he does not have authority over the Metropolitan Police.
>
> * * * *
>
> Q [Does Chief Powell have authority over] those who are detailed temporarily such as the Special Operations Division people on May 5th?

proof of Chief Wilson's independent involvement in the arrest process to make his liability one for the jury to decide.[3]

The record will not, however, support Chief Wilson's liability for malicious prosecution. Chief Wilson's involvement—other than his personal control and supervision of all Metropolitan Police participating in the arrests—was limited to participation in the arrest decision, which to be sure included determination of the charge to be recorded on the field arrest forms as the tentative charge upon which arrestees were to be held. Yet, as far as the

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A No, he did not have control over them.
Q Did he have authority over them?
A No.
Q Did he have authority to tell them to go up and bring people down off the steps?
A He had authority to make arrests, and they were there to assist him in the fundamentals of making arrests. * * * He did not have authority to issue them commands that Deputy Chief Zanders could not have countermanded, for example.

Deputy Chief Zanders, who reported to Chief Wilson, also testified as follows, Tr. 3423, 3424, JA 1829-1830:

Q Is it fair to say, sir, that you just left it up to Chief Powell as to whether these persons ought to be arrested or not?
A He made the initial determination, yes.
Q And you assumed that whatever he said was all right with you, is that right?
[A] Well, no, I don't think that is a correct statement, that I think what he was doing appeared to me to be a logical line of reasoning to follow and that I would concur with it.
If I thought the arrests were unreasonable, certainly I wouldn't have concurred with it.
Q You were not under Chief Powell's authority that day, were you?
A No, sir.

[3] No one has challenged the jury instructions on this aspect of the case.

record shows Chief Wilson's personal involvement with the events of May 5 ended with determination and recordation of the tentative charge. There is no evidence linking Wilson to the meeting on the evening of May 5 at which Chief Powell and Attorney Zimmerman convinced Attorneys Hannon and Moore to file informations. Indeed, although Wilson was an eyewitness to the events of May 5, there is no mention that he was contacted by the Assistant United States Attorneys at any time or filed a report with them. As we indicated in *Dellums I*,[4] the critical event triggering liability for malicious prosecution is the filing of an information. Having failed to link Chief Wilson with that decision, plaintiffs did not make out a *prima facie* case, and the judgment against him insofar as it awards damages for malicious prosecution must be vacated. Because the only basis for holding the District of Columbia liable for malicious prosecution is *respondeat superior* predicated on Chief Wilson's liability, the judgment against the District of Columbia, insofar as it awards damages for malicious prosecution, must also be vacated.

II. The District of Columbia

The District was held liable on a *respondeat superior* theory for all acts for which Chief Wilson was liable and also, as custodian, for violation of arrestees' Eighth Amendment rights. In addition to the defenses of Chiefs Wilson and Powell, the District asserts a number of theories intended to defeat *respondeat superior* liability and also challenges the sufficiency of the evidence to support Eighth Amendment damages.[5]

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[4] *See Dellums v. Powell*, —— F.2d ——, —— (D.C. Cir. No. 75-1974, decided August 4, 1977) (slip op. at 45-46) (hereinafter cited as *Dellums I*).

[5] Chief Wilson has been represented throughout this litigation by members of the staff of the Corporation Counsel for

A. *Defenses to Vicarious Liability for False Arrest*

1. *The Borrowed Servant Doctrine*

The law of agency is clear that a person generally the servant of one master can become a "borrowed" servant of another.[6] If the borrowed servant commits a tort while carrying out the bidding of the borrower, vicarious liability for that tort attaches to the borrower and not to the general master.[7] Relying on these propositions, the District argues that the sole master to whom liability can attach for the events of May 5 is the United States, the borrowing master.[8] Whether this is the case is usually

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the District of Columbia. *See* 4 D.C. Code § 143a (1973). The position the District has taken here gives us some pause, since it is potentially adverse to the interests of Chief Wilson insofar as the District's arguments would exonerate the District from joint and several liability with Chief Wilson. We would hope that the Corporation Counsel's office would examine its ethical obligations under the CODE OF PROFESSIONAL RESPONSIBILITY, *see* Ethical Considerations 5-14 to 5-19; Disciplinary Rule 5-105, and consider whether further representation of Chief Wilson is advisable. We note that under § 143a Chief Wilson will be reimbursed by the District for attorney's fees should the Corporation Counsel withdraw.

[6] *See, e.g., Denton v. Yazoo & Mississippi Valley R. Co.*, 284 U.S. 305 (1932); *Balinovic v. Evening Star Newspaper Co.*, 113 F.2d 505 (D.C. Cir. 1940); RESTATEMENT (SECOND) OF AGENCY § 227 (1958).

[7] *See, e.g., Denton v. Yazoo & Mississippi Valley R. Co., supra* note 6.

[8] The District places heavy reliance on *Provancial v. United States*, 454 F.2d 72 (8th Cir. 1972). There the court held that two municipal police officers who were also unpaid deputy special officers of the Department of the Interior, Bureau of Indian Affairs, were "employees" of the United States within the meaning of the Federal Tort Claims Act with respect to their actions in arresting an Indian on a reservation. The key fact in making this determination was that the officers would have had no authority to make such an arrest unless

a question of fact, generally to be decided by the jury.[9] Here, however, the facts are undisputed, and the only question is whether Chief Wilson and his men were "doing the work" of the United States or of the District of Columbia.[10]

We begin by noting that there is a presumption that an actor remains in his general employment [11]

> so long as, by the service rendered another, he is performing the business entrusted to him by the general employer. There is no inference that because the general employer has permitted a division of control, he has surrendered it.

There can be no question that Chief Wilson was performing "the business entrusted to him by [his] general employer" when he undertook to keep the peace on Capitol Hill pursuant to an agreement between the Capitol and Metropolitan Police. Consequently, to avoid liability the District must show that the United States had "the power

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they held special officer appointments. By parity of reasoning the District suggests that Metropolitan Police officers who are said to be similarly without general authority to make an arrest on the Capitol Grounds must have been officers of the United States when they made arrests upon the request of the United States. For reasons set out in text *infra* we reject the District's characterization of applicable law governing arrests at the Capitol. Further, we decline to follow *Provancial* since it did not purport to examine the borrowed servant doctrine and in addition did not consider whether the general employer of the officers might not be equally liable with the United States.

[9] *See* RESTATEMENT, *supra* note 6, § 227, comment *a*, at 501. *But cf. Dornan v. United States*, 460 F.2d 425 (9th Cir. 1972) (*semble*).

[10] *See Denton v. Yazoo & Mississippi Valley R. Co., supra* note 6, 284 U.S. at 308-309.

[11] RESTATEMENT, *supra* note 6, § 227, comment *b*, at 501; *accord, Dornan v. United States, supra* note 9, 460 F.2d at 428.

to control and direct [Chief Wilson] in the performance of [his] work," [12] and liability does not shift to the United States unless it had "authoritative direction and control" [13] over Chief Wilson, which is something more than the power merely to "suggest details or the necessary cooperation." [14]

The facts relevant to such proof are these. The Metropolitan Police Department of the District of Columbia is under a general duty to enforce the laws of the United States and of the District of Columbia within the territorial boundaries of the District. However, Congress has also provided for a Capitol Police force with the special obligation to patrol the Capitol Buildings and the Capitol Grounds.[15] This force is under the direction of a three-member Capitol Police Board which consists of the Sergeants-at-Arms of the Senate and House and the Architect of the Capitol.[16] The Capitol Police force is staffed by members of the Metropolitan Police Department, detailed to the Capitol for varying periods of time.[17] In addition, the Capitol Police are entitled to draw on the resources of the Metropolitan Police from time to time to provide necessary reinforcements. Acting under this authority Chief Powell had requested, and Chief Wilson had furnished, members of the Metropolitan Police Special Operations Division for the purpose of keeping order on May 5.

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[12] *Standard Oil Co. v. Anderson*, 212 U.S. 215, 222 (1909); *accord, Denton v. Yazoo & Mississippi Valley R. Co., supra* note 6, 284 U.S. at 309-310.

[13] *Standard Oil Co. v. Anderson, supra* note 12, 212 U.S. at 222.

[14] *Id.*

[15] 9 D.C. Code § 126 (1973), 40 U.S.C. § 212a (1970); *see* note 18 *infra*.

[16] *Id.*

[17] *See* 9 D.C. Code § 126-a (1973).

The division of authority between the Capitol Police and the Metropolitan Police with respect to the Capitol Buildings and Grounds is set out in 9 D.C. Code § 126 (1973), 40 U.S.C. § 212a (1970).[18] Under that section the Metropolitan Police are authorized to make arrests within the United States Capitol Buildings and Grounds, except that they may not patrol the Buildings or Grounds, nor may they "enter such buildings to make arrests in response to complaints or to serve warrants * * *," except with the consent (or upon request) of the Capitol Police Board. The District argues that the effect of this statute is to put any arrests for violations occurring on the Capitol Grounds under the control of the United States. We disagree.

First, the statute does not by its terms limit the authority of the Metropolitan Police to arrest persons violating the laws of the United States or of the District of Columbia when such violations occur in the presence of an officer of the Metropolitan Police who has been requested to patrol the Capitol Grounds.[19] Had the Capitol

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[18] This provision was amended in 1973, but the language relevant here was not changed. *See* 40 U.S.C. § 212a (Supp. V 1975).

[19] The legislative history indicates that Congress intended to allow the Metropolitan Police to make arrests on the Capitol Grounds when they were in pursuit of an offender and when they were asked to patrol on the Grounds, but not when acting on complaint or warrant. *See* S. Rep. No. 1709, 79th Cong., 2d Sess. 5 (1946):

> There are, of course, many instances [not barred by the requirement of consent of the Capitol Police Board] in which it is necessary for the Metropolitan Police to be able to make arrests within the Capitol Grounds, such as when pursuing traffic offenders; also to be able to make arrests within the Capitol Buildings; for example, when detailed to the Capitol at the request of the Capitol Police Board on occasions such as visits of the President, and other important events.

Grounds statute been violated by the plaintiffs, such a violation would manifestly have occurred in the presence of Metropolitan Police Officers. Thus, with respect to the arrests at issue here, 9 D.C. Code § 126 at most confers authority on the Capitol Police Board to prescribe methods for coordinating police action. Nonetheless, the record read in the light most favorable to the District does indicate that it was understood that Chief Powell would make the initial decision whether to arrest the plaintiffs.[20] Yet it is further undisputed that Chief Powell had no authority to order the Metropolitan Police officers on the scene to take persons into custody.[21] Only if Chief Wilson agreed that an arrest should be made would he then order the Metropolitan Police officers to begin the process of taking persons into custody. What the record shows, therefore, is that Chief Powell and Chief Wilson could each veto the other's decision to arrest the plaintiffs. Accordingly, the fact that arrests were made indicates an agreement or joint effort between Chiefs Powell and Wilson, each acting within the scope of his respective master's employment. Where such mutual or joint action exists, the borrowed servant doctrine is inapposite—for it conceives of authoritative direction and control vesting in one master to the exclusion of the other, not coordinated action by two masters of their respective servants—and liability attaches to both masters. This is true even if the situation is conceptualized as one in which Chief Wilson was acting simultaneously for both the United States and the District of Columbia.[22]

2. *Inconsistency of* Respondeat Superior *Liability with Other Federal Laws*

Although the District's arguments under this heading are somewhat inartfully drawn, it is apparently asking

[20] *See* testimony of Deputy Chief Zanders, quoted at note 2 *supra*.

[21] *See* testimony quoted at note 2 *supra*.

[22] *See* RESTATEMENT, *supra* note 6, § 226.

us to limit the scope of the remedy to be implied under *Bivens* principles to avoid what it sees as an inconsistency between vicarious municipal liability for constitutional torts and policies said to underlie the Federal Tort Claims Act and 42 U.S.C. § 1983. The argument from Section 1983 has been raised only with respect to Eighth Amendment liability, but its logical force cannot be so limited and we consider it here.

Arguments similar to the Federal Tort Claims Act point have been consistent losers in the courts of the District of Columbia. At first the District argued that the non-applicability of the Federal Tort Claims Act to the District of Columbia indicated a congressional intent that the District be altogether free from tort liability. This was rejected by this court sitting *en banc* in *Spencer v. General Hospital of the District of Columbia*, 425 F.2d 479, 484 (D.C. Cir. 1969). Subsequently, the position taken in *Spencer* was adopted by the District of Columbia Court of Appeals, also sitting *en banc*. *See Wade v. District of Columbia*, 310 A.2d 857, 861-862 (1973). The District next argued that it could not be held liable for the intentional torts of its police officers, pointing to provisions of the Federal Tort Claims Act which excepted false arrest, false imprisonment, and malicious prosecution from the waiver of sovereign immunity otherwise worked by that Act.[23] This argument was rejected by this court in *Carter v. Carlson*, 447 F.2d 358, 366-367

[23] [Sovereign immunity is not waived as to] [a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

28 U.S.C. § 2680(h) (1970). This subsection was amended in 1973 to remove the above exception as to "assault, battery, false imprisonment, false arrest, abuse of process, [or] malicious prosecution," 28 U.S.C. § 2680(h) (Supp. V 1975); however, this amendment applies only to claims arising after the date of the amendment.

(D.C. Cir. 1971), *rev'd in part on grounds not relevant here, sub nom. District of Columbia v. Carter*, 409 U.S. 418 (1973), and, again, was expressly rejected by the District of Columbia Court of Appeals sitting *en banc*, *Wade v. District of Columbia, supra*, 310 A.2d at 861-863.[24] Thus as matters now stand there can be no doubt that "the District of Columbia may be sued under the common law doctrine of *respondeat superior* for the intentional torts of its employees acting within the scope of their employment." *Id.* at 863.

This conclusion does not quite end our inquiry, however. At issue in both *Carlson* and *Wade* were common law torts. Here, on the other hand, the action is brought under a *Bivens* theory and is predicated on a tortious invasion of Fourth, First, and Eighth Amendment rights as well as of interests protected at common law. Nonetheless, this is an irrelevant distinction under the rationale of *Spencer*, *Carlson*, and *Wade*. In those cases the critical question was not the interests protected by tort law, but whether imposition of tort liability would impede " 'the performance of functions calling for the highest degrees of discretion and judgment." *Spencer v. General Hospital of the District of Columbia, supra*, 425 F.2d at 482, *quoting Elgin v. District of Columbia*, 337 F.2d 152, 156 (D.C. Cir. 1964). *Carlson* and *Wade* confirmed that the arrest function is not one calling for such discretion and judgment and consequently *respondeat superior* liability would lie.[25] In light of the reasoning in

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[24] The *en banc* opinion in *Wade* does not clearly disclose that the District in that case made both arguments set out in text. The panel opinion in that case does show this, however. *See Graves v. District of Columbia*, 287 A.2d 524, 525 (D.C. App. 1972).

[25] *See Carter v. Carlson*, 447 F.2d 358, 366 (D.C. Cir. 1971), *rev'd in part on other grounds, sub nom. District of Columbia v. Carter*, 409 U.S. 418 (1973); *Wade v. District of Columbia*, 310 A.2d 857, 860 (D.C. App. 1973) (*en banc*). Of course, both *Carter* and *Wade* recognized that the arrest function involved discretion in the ordinary sense but not discretion in the policymaking sense, which is the interest protected by municipal immunity.

these cases and our holding above that Chief Wilson was not a borrowed servant, we again reject the District's Tort Claims Act argument and hope that, after four strikes, it is now finally and decisively put out.[26]

The District's second argument is more troublesome, but it is also unavailing. As we understand the argument, it is that relief in a *Bivens* action should be styled on the pattern of 42 U.S.C. § 1983. Since the legislative history of Section 1983 was held in *Monroe v. Pape*, 365 U.S. 167 (1961), to preclude suits against municipalities, it is argued it would be anomalous for us to find a right of action under *Bivens* against the District of Columbia. More troublesome yet is the subsequent decision in *Moor v. County of Alameda*, 411 U.S. 693 (1973), where the Court held that a municipality could not be held vicariously liable for Section 1983 damages even though state law quite clearly recognized such liability in common law tort suits.

At the threshold it must be recognized that both *Bivens* and the law of false arrest in the District of Columbia are federal common law doctrines. Both protect constitutional rights coming under the general heading of the Fourth Amendment, although the *Bivens* action goes farther in recognizing damages for violation of First and Eighth Amendment rights as well. As a consequence of this parallelism, acceptance of the argument proffered by the District would require reversal in both *Carlson* and

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[26] The history of District of Columbia liability in tort is traced in *Spencer v. General Hospital of the District of Columbia*, 425 F.2d 479, 481 n.2 (D.C. Cir. 1969) (*en banc*). The most recent decision rejecting the District's claims of sovereign immunity is that of the District of Columbia Court of Appeals in *Wade v. District of Columbia, supra* note 25.

Wade as well as in this case. Manifestly, such a wrench in the well settled law of the District of Columbia should not be lightly considered, or imposed without the clearest indication that Supreme Court cases mandate such an outcome.

We begin our analysis by noting that Section 1983 does not apply to officers of the District of Columbia. In *District of Columbia v. Carter*, 409 U.S. 418 (1973), a unanimous Supreme Court held that the phrase "[e]very person who, under color of any statute * * * of any State or Territory," which describes those subject to Section 1983 liability, does not apply to officers of the District of Columbia since it is neither a state nor a territory within the meaning of Section 1983. The rationale for construing this language narrowly was that the historical situation of the District was such that it was extremely unlikely that the Civil War era Congress intended to address itself to the problem of civil rights in the District: [27]

> There was no need * * * to create federal court jurisdiction for the District of Columbia. Even prior to 1871, the courts of the District possessed general jurisdiction over both federal and local matters. * * * Thus, the jurisdictional aspects of § 1 of the 1871 Act were entirely superfluous with respect to the District. Moreover, while Congress was unable to exert any direct control over the actions of state officials, it was authorized under Art. I, § 8, cl. 17, of the Constitution to exercise plenary power over the District of Columbia and its officers. * * * And since the District is itself the seat of the National Government, Congress was in a position to observe and, to a large extent, supervise the activities of local officials. Thus, the rationale underlying Congress' decision not to enact legislation similar to § 1983 with respect to federal officials * * * is equally applicable to the situation then existing in the District of Columbia.

[27] *District of Columbia v. Carter, supra* note 25, 409 U.S. at 429-430 (footnotes and citations omitted).

Because Congress did not address the problem of civil rights in the District, the legislative history of Section 1983 obviously does not directly limit the common-lawmaking powers of the courts of the District of Columbia.

Nor is the rationale for the congressional exemption of municipalities from Section 1983 liability so persuasive that it should be recognized by the common law as a matter of logic and reason. As indicated in *Monroe, Moor*, and *District of Columbia v. Carter*, Congress stayed its hand, not out of any special solicitude for municipalities, but because "the House had solemnly decided that in their judgment Congress had no constitutional power to impose any obligation upon county and town organizations * * *." *Monroe v. Pape, supra*, 365 U.S. at 190. Even assuming that this is a correct statement of constitutional principle, it is nonetheless a rationale that simply points nowhere on the issue before us. *See* U.S. CONST., Art. I, § 8, cl. 17.

Moreover, if one is casting about through the United States Code for guidance in structuring the common law of *respondeat superior*, the 1973 amendments to the Federal Tort Claims Act cannot be overlooked.[28] Those amendments modify 28 U.S.C. § 2680(h) so that the federal government is now generally responsible for the intentional torts of its law enforcement officers. The Senate report, while recognizing *Bivens* as a source of relief for an injured party, stated: "Of course, Federal agents are usually judgment proof so this [*Bivens*] is a rather hollow remedy." S. Rep. No. 588, 93d Cong., 1st Sess. 3 (1973). The Report goes on to indicate that the waiver of sovereign immunity is intended to be "a counterpart to the Bivens case and its progenty [*sic*]" by making the government "independently liable in damages for the same

[28] The amendments are contained in § 2 of Pub. L. No. 93-253, 88 STAT. 50 (1973). Section 2680(h) as amended is codified at 28 U.S.C. § 2680(h) (Supp. V 1975).

type of conduct that is alleged to have occurred in *Bivens* * * *." *Id.* Thus to adopt the District's position on the theory that it removes an anomaly in the law of municipal liability would be to create an anomaly in the application of the only extant congressional statement of policy dealing precisely with the question of the need and wisdom of *respondeat superior* liability for constitutional torts.

For the reasons set out above, we conclude that neither the Federal Tort Claims Act nor Section 1983 requires us to restrict relief for false arrest under a *Bivens* theory to a narrower compass than under the settled common law.

B. *Defenses to Eighth Amendment Liability*

Arrests of the plaintiffs commenced between 3:00 and 4:00 P.M. on May 5. Each arrestee was charged with unlawful entry, and field arrest forms were completed to reflect the fact of arrest and the identity of the arresting officer. Persons processed in this way were placed aboard buses and taken to the District of Columbia Coliseum which had been pressed into service as a temporary detention facility. Testimony concerning subsequent events is conflicting in some respects due to the different vantage points of the various observers and fading powers of recollection. Nonetheless, an outline of essentially uncontested facts can be made out.[29]

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[29] The District of Columbia does not appear to have challenged on cross-examination any of the testimony offered concerning conditions of detention. On appeal the District has generally conceded the accuracy of this testimony or has been unable to cite record support for any of its contrary assertions.

At the Coliseum arrestees were told that they would be taken before a Superior Court judge for arraignment if they would consent to being "processed" into the criminal justice system by having their fingerprints taken and answering a detailed set of questions. Notwithstanding this promise, persons who had completed processing were told to sit in the stands, were moved back and forth from the stands to the floor perhaps a number of times, and were not brought before judges until at the earliest some time in the late morning of May 6.[30] No reason appears in the record why this group was not taken expeditiously before the Superior Court, which was sitting in continuous session at the time.

Those who refused to submit to "processing"—some 500 persons[31]—were segregated within the Coliseum and were detained there until the late afternoon of May 6. At that time all persons who had refused processing were taken to the cellblock in the United States Courthouse. Some

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[30] Persons were delayed both in leaving the Coliseum and in being arraigned once they were in the vicinity of the Superior Court. For example, one arrestee who was processed almost immediately upon arrival at the Coliseum, Tr. 857, JA 662, was apparently taken from the Coliseum some time on May 6, *see* Tr. 858, JA 663, but was not arraigned until 5:00 A.M. on May 7, Tr. 867, JA 672. Another witness testified that she had finished processing about 4:30 P.M. on May 5, but was not taken from the Coliseum until 6:00 P.M. the following day and did not gain her release until some five hours later. Tr. 974-975, JA 739-740. *See also* Tr. 620, 887, 954, JA 460, 681, 733.

[31] The record is not clear on how many persons were moved to the cellblock. In *Sullivan v. Murphy*, 478 F.2d 938, 952 (D.C. Cir.), *cert. denied*, 414 U.S. 880 (1973), facts were presented which tended to indicate that 500 persons were so detained. *See also* note 35 *infra*.

100 persons were left at the Coliseum, awaiting processing or transportation to the Superior Court.

Conditions at the Coliseum were unpleasant. No food was available until some time late in the evening of May 5, at which time bologna sandwiches were tossed out into the crowd.[32] Toilet facilities were limited and apparently dirty. Some arrestees were denied permission to use the toilets; others had to wait in long lines. There was testimony that the police harassed women waiting in such lines and made obscene comments to them. Telephones were not reasonably accessible. Although three or four volunteer attorneys may have been allowed into the Coliseum, the police kept other attorneys away, with the result that few arrestees were able to obtain any legal advice before processing. Those who wanted to sleep had to lie down on a concrete floor. The evening was cold and blankets were not available for all, although the magnitude of the shortage is not clear. Finally, there was testimony that the police at one point removed their identifying badges and swept through the crowd of persons who had refused processing, beating them with batons.[33]

Conditions of detention at the cellblock in the United States Courthouse were, if anything, worse. Male arrestees were placed into cells so overcrowded that there was insufficient room for all to sit down at once. Although estimates of the numbers of persons placed in each cell

[32] Tr. 541, 621, 954, JA 386, 461, 733. There was also mention of fried chicken and soft drinks being made available by the National Guard present in the Coliseum. Tr. 621, JA 461.

[33] There may have been more than one such incident. One beating episode apparently occurred when police decided to move those who had refused processing to the cellblock at the United States Courthouse. At that time some demonstrators apparently went limp and locked arms. It appears the police beat such persons in an attempt to get them to break the holds. *See* Tr. 753-754, 770, JA 584-585, 601. Whether such force was excessive is not clear.

vary, it appears to have been over 100.[34] There was only one toilet per cell. Many arestees were suffering from upper respiratory infections and some from gastroenteritis, yet only limited medical care was available. In the women's section conditions of overcrowding were apparently less severe since the women were not confined to individual cells. Again, attorneys were turned away from the cellblock and finally gained entrance only under orders obtained from various judges of the Superior Court.[35]

On these facts the jury found that plaintiffs had been subjected to conditions which were "inhuman and shocking to the conscience," [36] and which "fell short of * * * basic minimal human standards," [37] and it awarded each member of the class $500. On appeal the District at-

[34] One witness estimated that as many as 140 persons were placed in each cell. Tr. 757, JA 588.

[35] After a personal tour of the cellblock on the evening of May 6-7, Superior Court Judge Belson entered an order requiring an immediate 75% reduction of the numbers of persons being held. In his order Judge Belson stated:

> In consideration of the inspection by the Court and the testimony taken, the Court finds that the approximately 600 persons presently detained prior to arraignment in the facility in question are being held under conditions which grossly violate the minimum standards properly applicable even to temporary detention facilities. The Court finds that serious conditions of overcrowding exist at the facility and that from a standpoint of health and sanitation the facility is totally inadequate for the purpose for which it is being used. It is concluded that the petitioners are experiencing cruel and unusual punishment and irreparable injury by reason of their being held in the detention facility described above.

D.C. Public Health Ass'n v. Superintendent, D.C. Jail, No. SP49-7 (D.C. Superior Court May 7, 1971).

[36] Tr. 25, JA 2307.

[37] Tr. 26, JA 2308.

tacks this judgment on many fronts. It argues that violation of the Eighth Amendment should not give rise to an action for damages, especially against a municipality. It also argues that the damages arising from the conditions of confinement did not fall equally on the class as a whole, but fell not at all on those with a blanket, those with food, those with an attorney, etc. Accordingly, individualization of damages was required, or at least subclasses should have been formed distinguishing those held only at the Coliseum from those held at both the cellblock and the Coliseum. Finally, it argues that the conditions of confinement, though unpleasant, were not so bad as to constitute a constitutional violation.

We start with a point not canvassed by the District: whether the damages awarded for Eighth Amendment [38] violations were duplicative of the damages awarded for false arrest and false imprisonment. The jury was charged that, in setting the damages for false arrest and false imprisonment, it could "consider both the length of time that plaintiffs were held and the treatment and conditions of detention to which they were subjected * * *." [39] And, again, that it "should consider as elements of damages any humiliation and the deprivation of

[38] We note that a number of circuits have reached the conclusion that the Eighth Amendment's cruel and unusual punishment clause does not apply to pretrial detainees. *See Rehm v. Malcolm*, 507 F.2d 333, 337 (2d Cir. 1974); *Johnson v. Glick*, 481 F.2d 1028, 1032 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973); *Hampton v. Holmesburg Prison Officials*, 546 F.2d 1077 (3d Cir. 1976); *Anderson v. Nosser*, 456 F.2d 835, 838 (5th Cir.) (*en banc*), *cert. denied*, 409 U.S. 848 (1972). These cases have nonetheless granted relief under various theories of due process and equal protection. For convenience, we will continue to refer to the cruel and unusual punishment claims as Eighth Amendment claims, but we do not intend thereby to resolve the issue of the applicability of the cruel and unusual punishment clause to pretrial detainees.

[39] Tr. 21, JA 2308.

any right caused by the loss of liberty." [40] In a supplemental instruction damages to First Amendment interests were distinguished from the right "to be secure in your person and effects, safe from any unlawful interference," [41] which is protected by the Fourth Amendment and tort law of false arrest. As a consequence of these instructions, a jury must have understood that damages for false arrest, while imprecise, were to be set to compensate for the insult of false arrest, any subsequent humiliation or mistreatment, and the duration of loss of liberty.

No separate instruction was given on the measure of Eighth Amendment damages. The jury was told, however, that it could consider whether the police used "excessive and unnecessary physical force * * *, whether or not they were furnished adequate nourishment, whether or not they were furnished with adequate shelter under reasonable conditions, bedding and toilet facilities." [42] It was also told that "you may take * * * into account the length of time during which these persons were subjected to these [inhuman] conditions in assessing damages for [cruel and unusual punishment]." [43] The only fair construction of these directions is that the jury was to award damages for the duration and conditions of detention, including any mistreatment. Accordingly, the jury was in effect told to compensate the plaintiff class twice except insofar as the instructions on false arrest allowed damages to be awarded for the insult of the tortious arrest and the violation of Fourth Amendment rights.

Further, we think the District's argument is correct that Eighth Amendment damages could not be given on a

[40] Tr. 32, JA 2314.

[41] Tr. 64, JA 2346.

[42] Tr. 26, JA 2308.

[43] *Id.*

uniform basis to the class as a whole. The verdict form used for false arrest, which divided the class into four subclasses on the basis of length of incarceration, and the non-uniform damages returned thereon are ample indications that the class was not unified for purposes of damages. To be sure, the tortfeasor cannot be heard to insist on meticulous accuracy in setting damages. Nonetheless, we think that at a minimum the class should have been divided for Eighth Amendment purposes into those held only at the Coliseum and those held at the cellblock of the Courthouse as well. Whether other subclass divisions suggested by the District are fair or administrable we need not decide.

For the reasons stated above, we set aside the judgment awarding damages for cruel and unusual punishment against the District. For this reason, and because our affirmance of the District's liability for false arrest makes the Eighth Amendment claim surplusage in any case, we do not reach the other arguments against Eighth Amendment liability raised by the District on this appeal.

C. *Defense to All Claims—Failure of Class Plaintiffs to Comply with Statutory Notice Requirement*

The District of Columbia asserts that members of the plaintiff class [44] are barred from recovering damages because they failed to comply with the statutory notice requirements of 12 D.C. Code § 309 (1973). That statute provides:

> An action may not be maintained against the District of Columbia for unliquidated damages to person or property unless, within six months after the injury or damage was sustained, the claimant, his

[44] The District does not now assert a similar defense against Congressman Dellums and, therefore, we have no occasion to consider whether the notice given the District was sufficient as to him.

> agent, or attorney has given notice in writing to the Commissioner of the District of Columbia [now, presumably, the Mayor] of the approximate time, place, cause, and circumstances of the injury or damage. A report in writing by the Metropolitan Police Department, in regular course of duty, is a sufficient notice under this section.

The District's allegation is not that it received no notice at all, but the technical objection that a letter from the Special Counsel of the American Civil Liberties Union advising the District of class members' claims was legally insufficient to discharge the statutory notice requirement. In part, Special Counsel's letter stated: "On May 5, 1971, between 3:00 and 5:00 p.m., approximately 1200 claimants whom we represent were unlawfully arrested by police officers on the House steps of the Capitol." [45] At-

[45] The letter reads in full:

November 4, 1971

The Honorable Walter Washington
District Building
Washington, D.C. 20004

Dear Mr. Commissioner:

On May 5, 1971, between 3:00 and 5:00 p.m., approximately 1200 claimants whom we represent were unlawfully arrested by police officers on the House steps of the Capitol. The arrests were made without probable cause, and people were subjected to excessive force, conversion of property, and other abusive actions in connection with the arrests, were held in unlawful detention and under conditions that were overcrowded, unsanitary, and otherwise inhumane, were denied the right to counsel and to communicate with families and friends, were compelled to undergo unlawful processing, including fingerprinting and photographing, and were held for prosecution for purposes of harassment, in bad faith and with no hope of obtaining valid convictions. As a result of these wrongs, the people involved have been denied their constitutional rights and have sustained injuries and damages in unliquidated amounts.

[continued]

tached to the letter was a list of 11 named individuals and their respective addresses. Of these 11 nine were subsequently listed as representative plaintiffs in this suit. Also attached to the letter were the names (without addresses) of some 65 individuals (including the previously named 11) with comments indicating the places where each individual was detained, the duration of his or her detention, and injuries claimed to have been received. The claims of the 65 were stated to be representative of the claims to be made by the class as a whole.

The District's position appears to be that Section 309 requires each person asserting the claim against the District (1) to identify himself by name and (2) to write personally to the Commissioner. Support for this position is said to be found, not in Section 309 itself, but in cases construing the Federal Tort Claims Act.

Before taking up this argument in detail, it is necessary to stake out some general principles. Section 309 is intended [46]

> to protect the District of Columbia against unreasonable claims and to assist it in the defense of the public interest where claims are made within the * * * statute of limitations but so long after the events that it is impossible for the District of Columbia to obtain evidence for use in litigation which may result.

To this end Section 309 gives "District officials reasonable notice of the accident so that the facts may be ascertained

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Accompanying this letter is a list of names of individual claimants who suffered injuries that are typical of those sustained by the group of claimants as a whole.

Yours truly,

/s/ Monroe H. Freedman
MONROE H. FREEDMAN
Special Counsel

[46] H.R. Rep. No. 2010, 72d Cong., 2d Sess. 1 (1933); *see, e.g., Miller v. Spencer*, 330 A.2d 250, 251 (D.C. App. 1974).

and, if possible, the claim adjusted." [47] Unlike 28 U.S.C. § 2675(a) (1970), the analogous provision of the Federal Tort Claims Act, however, Section 309 does not bar an action until a "claim shall have been finally denied." That is, Section 309, unlike Section 2675(a), does not contain a requirement that administrative remedies be exhausted. Nor is failure to give Section 309 notice a jurisdictional bar to suit—if such failure is not asserted as an affirmative defense it is waived.[48] Finally, although Section 2675(a) has been construed narrowly because it constitutes a waiver of sovereign immunity,[49] a similar doctrine of strict construction is not required for Section 309 because the District has no sovereign immunity from liability for the non-discretionary acts of its employees.

For the reasons stated above, cases construing the Federal Tort Claims Act and regulations issued thereunder are not helpful in deciding the problem before us. Instead, we must find a solution in the language, purpose, and prior construction of Section 309.

We first note that Section 309 does *not* by its terms require any claimant to file notice personally. Notice may be made through an agent or attorney. And although such an agent or attorney might normally be expected to disclose the name of his principal, the statute does not require giving the claimant's name, but only "the approximate time, place, cause, and circumstances of the injury or damage." Accordingly, if the ACLU Special Counsel were considered to be the agent or attorney of the unnamed class members, the language of Section 309

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[47] H.R. Rep. No. 2010, *supra* note 46, at 2.

[48] *F. W. Woolworth Co. v. Stoddard*, 156 A.2d 229, 231 (D.C. Mun. App. 1959).

[49] *See, e.g., Commonwealth of Pennsylvania v. National Ass'n of Flood Insurers*, 520 F.2d 11, 19-20 (3d Cir. 1975), and cases cited therein.

standing alone would create no bar to class-wide recovery.

In this court's last encounter with Section 309 we held that a claimant's obligation to give notice was discharged even though a non-agent of the claimant (the claimant's insurance company) had given notice to the District. *See Smith v. District of Columbia*, 463 F.2d 962, 965 (D.C. Cir. 1972). Under that decision there would be little question that the ACLU Special Counsel's letter would have the same force as one from an agent or attorney. On remand, however, the District of Columbia Court of Appeals evinced some irritation at our decision and indicated that it felt free to disregard *Smith* in the future.[50] Therefore, we do not rely on *Smith* but turn instead to some first principles concerning Rule 23 of the Federal Rules of Civil Procedure.

The purpose of the class action procedure established under Rule 23(b)(3) is to create an efficient mechanism for trying claims that share common questions of law or fact when other methods of consolidation are impracticable. To effectuate the purpose of reducing many potential or pending suits to one, the judgment in the class suit—even when entered upon settlement—runs to all members of the class identified therein and is binding on the class insofar as representation by the named parties has been adequate and due process has otherwise been afforded. As a practical matter, therefore, the named parties are the agents for all and the class attorneys are the attorneys for all. Nothing in the language of Section 309 requires an agent or attorney within the meaning of that statute to be appointed by agreement rather than by operation of law. Consequently, unless the purposes of Section 309 would be contravened by a construction recognizing the quasi-agency relationship cre-

[50] *See District of Columbia v. Smith*, 297 A.2d 787, 789 (D.C. App. 1972).

ated by Rule 23, we think a construction should be adopted recognizing the class attorney as an agent for all class members since this both accords with the practicalities of class litigation and avoids embarassments to the proper operation of Rule 23.[51]

As we have already indicated, the purposes of Section 309 are, primarily, to provide the District an opportunity to investigate claims while the circumstances giving rise to them are fresh and, secondarily, to provide an opportunity for settlement. Because the claims asserted by the class representative must be typical of those of the class as a whole,[52] the claims of any class member should in ordinary course be sufficient to indicate what evidence will be relevant to any defenses the District may have.[53] Rule 23 also provides a mechanism whereby the class representative and his attorney can settle an action for the class as a whole (subject in some instances to the power of individual class members to opt out of any proposed settlement)[54] and we see no reason why this mechanism would not be adequate to meet any legitimate interests the District may have in settling claims against it. Thus there is no conflict at an analytical level between the purposes of Section 309 and a rule recognizing the class lawyer as the attorney or agent of all class members for Section 309 purposes.

Nor in the circumstances of this case has there been any prejudice to the District from the Special Counsel's failure to state the names of all 1,200 class members in his

[51] *See American Pipe & Const. Co. v. Utah*, 414 U.S. 538, 551-559 (1974). *See also* Note, *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1448-1454 (1976).

[52] Rule 23(a)(3), FED. R. CIV. P.

[53] *See generally Developments, supra* note 51, 89 HARV. L. REV. at 1448-1454.

[54] Rule 23(e), FED. R. CIV. P.; *see Developments, supra* note 51, 89 HARV. L. REV. at 1552-1576.

letter.[55] The District has not even sought to take discovery from persons named in the letter, let alone those not named. Moreover, had the District wanted the names they were readily available in the police reports of the arrests of May 5. Thus, although we recognize that notice of a claim of false arrest cannot reasonably be found in a police report alone,[56] we think Special Counsel's assertion of a claim coupled with the police reports gave the District all the notice to which it was lawfully entitled.[57]

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[55] Had prejudice arisen from failure to disclose the names of claimants, a result different from that here might be required. *But see* note 57 *infra*.

[56] In *Brown v. District of Columbia*, 304 A.2d 292 (D.C. App. 1973), the District of Columbia Court of Appeals held that an arrest report was defective as § 309 notice because it did not disclose any claim of injury. *See* 304 A.2d at 293.

[57] In *Hurd v. District of Columbia*, 106 A.2d 702 (D.C. Mun. App. 1954), Mrs. Hurd sued the District for personal injuries arising from a fall on a sidewalk. Her letter of notice gave an inaccurate location for the place of the fall. Later, however, Mrs. Hurd's attorney recognized the mistake and sent a letter to the District's Inspector of Claims correcting the location of the fall. The court held that the second letter, although not sent to the Commissioner of the District as required by § 309, was nonetheless sufficient to correct inaccurate information given in the proper notice. *See* 106 A.2d at 704-705. Here, proper notice was given to the District of the claims of 1,200 putative class members, *see* note 45 *supra*, except that the names were left out. We see no reason why, under *Hurd*, the arrest reports which the District had had in its possession since May 5, 1971 could not supplement the notice filed with the District, even assuming *arguendo* that names were required to be disclosed by § 309. Surely the filed arrest forms are "report[s] in writing by the Metropolitan Police Department, in regular course of duty" as described in § 309. *Brown v. District of Columbia*, *supra* note 56, is not to the contrary since the court held there that an arrest record was defective solely because it did not give notice that a claim for false arrest was being asserted. Here, the letter from ACLU Special Counsel filled that void.

Because we conclude that 12 D.C. Code § 309 can be read consistently with Rule 23, FED. R. CIV. P., we have no need to consider the separate argument that § 309 was never intended to apply to constitutional actions. We note, however, that the District Court has concluded that § 309 is no bar to a constitutional action, *see* Order of April 8, 1976 in *Lively v. Cullinane*, D. D.C. Civil Action No. 75-0315. This decision rests heavily on Judge Leventhal's holding in *Sullivan v. Murphy*, *supra* note 31, 478 F.2d at 971-973, that a District of Columbia Code provision, 4 D.C. Code § 137 (1973), did not bar equitable relief of constitutional violations where there was no indication that Congress intended to reach such a result.

III. CONCLUSION

For the reasons stated above, we vacate the judgment entered against the District of Columbia defendants for malicious prosecution and for violation of Eighth Amendment rights. In accord with our mandate in *Dellums I*, we also vacate the damages awarded for violation of First Amendment rights and remand this facet of the case for a new trial. In all other respects the judgment of the District Court is

Affirmed.

TAMM, *Circuit Judge*, dissenting: I respectfully dissent for the reasons set forth in my dissenting opinion in *Dellums v. Powell*, No. 75-1974 (D.C. Cir. August 4, 1977).

APPENDIX B

[FILED AUGUST 4, 1977]

JUDGMENT

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and were argued by counsel. On consideration thereof, it is

ORDERED AND ADJUDGED by this Court that the judgment of the District Court appealed from in these causes is hereby affirmed in part and reversed in part, in accordance with the opinion of this Court filed herein this date.

Peh Curiam

For the Court:

George A. Fisher,
Clerk

BEST COPY AVAILABLE

APPENDIX C

[Filed November 14, 1977]

ORDER

The suggestion for rehearing *en banc* filed by appellants District of Columbia, et al, having been transmitted to the full Court and no Judge having requested a vote with respect thereto, it is

ORDERED by the Court *en banc* that appellants' aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam

For the Court:

George A. Fisher,
Clerk

[FILED NOVEMBER 14, 1977]

ORDER

Upon consideration of the petitions for rehearing filed by appellees Ronald V. Dellums, et al, and appellants District of Columbia, et al, it is

ORDERED by the Court that the aforesaid petitions for rehearing are denied.

Per Curiam

For the Court:

George A. Fisher,
Clerk

see
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